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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term 1941.

No. 1152

HARRY LEAFORD MILLER and SAMUEL EUGENE CROSBY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

DAN R. SCHWARTZ,
Attorney for Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term 1941.

No.

HARRY LEAFORD MILLER and SAMUEL EUGENE CROSBY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Now come Harry Leaford Miller and Samuel Eugene Crosby and respectfully show and represent to this Honorable Court as follows:

1. Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, No. 9972, entered on February 20th, 1942. Petition for rehearing was denied on March 24th, 1942, affirming the

orders and judgment of the United States District Court for the Southern District of Florida, Jacksonville Division.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240-(a), of the Judicial Code as Amended, and the Rules of Practice and Procedure in Criminal Cases, as promulgated by this Honorable Court.

REASONS RELIED UPON FOR SEEKING THE JURISDICTION AND FOR THE ALLOWANCE OF THE WRIT.

Because the United States Circuit Court of Appeals for the Fifth Circuit, in affirming the orders and judgment of the District Court:

1. Has decided important questions of general law in conflict with the weight of authority.

(a) Said decision on questions of law conflicts with the opinions of this Honorable Court.

(b) Said decision on questions of law conflicts with the decisions of at least two different United States Circuit Courts of Appeal, namely the Second and the Eighth Circuits.

2. The decision has so far departed from the accepted and usual judicial procedure and has so far sanctioned such a departure by the lower court as to call for an

exercise of the power of supervision of this Honorable Court.

(a) Said decision rendered null and void, the accuseds' rights to cross examination of a witness for the prosecution.

(b) Said decision rendered null and void, the accuseds' rights to be confronted with a witness against them, as guaranteed by the Sixth Amendment to the Constitution of the United States.

(c) Said decision, although admitting error in the lower court, erroneously found said error to be "harmless", in a case based upon circumstantial evidence alone, and where there was a conflict in the testimony.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioners were convicted of violation of the Internal Revenue Laws of the United States, relating to non-tax paid distilled spirits, both the substative offense and a conspiracy being consolidated for trial.

The testimony as to petitioners was entirely circumstantial, and error was admitted by the Circuit Court of Appeals for the Fifth Circuit (page 6 of the printed opinion), when counsel was refused the right to examine a paper used by a Government witness, Louis N. West, who admitted from the witness stand that he was refresh-

ing his memory as to certain automobile truck license numbers and the street number of a garage.

A Co-defendant, Lee Cantrell, was taken ill after the jury was empanelled and before any testimony was offered, and a mistrial and severance was entered as to him (R. 14-15). Subsequently, statements attributed to Cantrell, were admitted in evidence over proper objections (R. 53).

Since the evidence was entirely of a circumstantial nature and did not exclude a reasonable hypothesis of innocence, the motion for a directed verdict of not guilty should have been granted.

ASSIGNMENT OF ERRORS.

1. Refusal of the trial court to allow petitioners to see memorandum testified from, from the witness stand.

2. Admission of testimony of an alleged conspirator, not on trial.

3. Inadequacy of circumstantial evidence to warrant conviction, especially considering the fact that error in the admission of testimony was admitted by the Circuit Court of Appeals.

Wherefore, for the foregoing reasons, as amplified in the following supporting brief, petitioners respectfully submit that their petition for Writ of Certiorari should be granted.

DAN R. SCHWARTZ,
Attorney for Petitioners.

ARGUMENT IN SUPPORT OF PETITION.

I.

The refusal of the lower court to permit petitioners' counsel the right to examine the notes testified from by the witness Louis N. West (see supplemental record filed and admitted by Circuit Court of Appeals at time of argument, but inadvertently omitted from original record), was reversible error and in conflict with the principle laid down by this Honorable Court in *United States vs. Socony Vacuum Oil Company,* 80 Supreme Court 811, 849; 310 U. S. 150; 84 Law Edition 1129, where this Honorable Court held:

> "Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to a witness. (Morris vs. U. S., 5th Circuit, 149 Fed. 123, 126, 9 Ann. Cas. 558. Lennon vs. U. S. 8th Circuit, 20 Fed. (2d) 490, 493, 494. Wigmore, Evidence, (Second Edition), Paragraph 762."

In the foregoing opinion of this Honorable Court, the case of *Little vs. United States,* Eighth Circuit, 93 Fed. 2d 401, was cited with approval, which held,

> "counsel for the Government argued that it is impossible to say from the record whether the witness refreshed his memory upon a disputed fact or purely on an undisputed fact, and that therefore the record fails to show that the appellant was prejudiced. This argument is a mis-application of Section 269 of the Judicial Code as Amended, 28 U. S. C. 391, (28 U. S. C. A. 391), which provided that in an appellate pro-

> ceeding, judgment shall be given without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This Honorable Court also cited with approval, in the case of *United States vs. Socony Vacuum Oil Company, supra,* the case of *Morris vs. United States, supra,* in which the Circuit Court of Appeals for the Fifth Circuit held:

> "We understand it to be a universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his memory with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified. This rule is found in all the text books, and if numerous adjudged cases declaring it are not found on all hands it is because of the absence of nisi prius reports and because so few courts have ever denied the right in question * * * It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which were permitted here * * *. The rule should be more rigidly adhered to in criminal than in civil cases."

The decision of the Fifth Circuit Court of Appeals was also in conflict with the Eighth Circuit Court of Appeals in *Lennon vs. United States,* 20 Fed. 2d 490, which this Honorable Court cited with approval in the case of *United States vs. Socony Vacuum Oil Company, supra,* the opinion holding that:

> "It is a well settled rule that the opposing party, or counsel, has the right, on proper demand, to inspect and use for the purposes of cross examination, any paper or memorandum which is used by a witness

> while on the stand for the purpose of refreshing his present recollection. This right is accorded in order that he may ascertain whether the paper or memorandum has any legitimate tendency to bring the facts in controversy to the mind of the witness and in order that he may be in a position to cross examine as to the testimony given, thereby to test the candor and integrity of the witness."

The Eighth Circuit Court of Appeals, in *Little vs. United States,* 93 Fed. 2d 401, cited and approved by this Honorable Court, held:

> "An accused or his counsel has the right, on proper request or demand, to inspect and use for cross examination, any paper or memorandum used by a witness on direct examination in refreshing his present recollection."

The decision of the Fifth Circuit Court of Appeals is also in conflict with the Second Circuit Court of Appeals which held, in *Goldman, et als. vs. United States,* 118 Fed. 2d 310, 314:

> "Memoranda actually used by a witness when testifying, may be examined by opposing counsel on request";

citing with approval, *United States vs. Socony Vacuum Oil Company, supra; Morris vs. United States, supra,* and *Lennon vs. United States, supra.*

The opinion of the Fifth Circuit Court of Appeals in the instant case, at page six, held:

"Although the evidence as to Miller and Crosby was wholly circumstantial—."

Thus, we contend, any evidence as to automobile truck license numbers was prejudicial as the evidence as to trucks permeated the entire case, particularly as to the petitioner Miller.

The Eighth Circuit Court of Appeals held in *Little vs. United States,* 93 Fed (2d) 401:

"The burden of showing prejudice is upon the appellant and he is not entitled to reversal of a judgment or a conviction unless it appears that he has been denied some substantial right and has been, thereby, prevented from having a fair trial—."

"Here appellant was denied his undoubted right properly to cross examine the witness. The evidence as to his own guilt was conflicting. He testified in his own behalf to facts which, if credited and believed by the jury, would establish his innocence. Under these circumstances, it would seem that the appellant had acquitted himself of the burden of pointing out in the record the denial of a substantial right."

On the question that the rejection of evidence was erroneous and that it was prejudicial, this Honorable Court held in *McCandless et ux vs. United States,* 298 U. S. 342, 347, 56 Supreme Court, 764, 766:

"Second. The court below, while ruling that the rejection of the evidence was erroneous, held that it was not prejudicial error within the terms of section

269 of the Judicial Code, as amended (28 U. S. C. §391, 28 U. S. C. A. §391), reproduced in the margin.* The court thought the offers of proof were not sufficiently specific to enable it to say that the rejection, although erroneous, was prejudicial. Apparently what was meant by the offers not being sufficiently specific, as indicated by a statement earlier in the opinion, is that they did not show what would be the value of the land when reclaimed, nor the cost of developing and delivering a sufficient water supply. But that seems to be the exact basis of the government's contention that the offer was not complete, which, affirming the court below, we have just held is without merit. We think equally it constitutes no ground for sustaining the ruling of the trial court as nonprejudicial. The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line. Cf. Rogers v. Brent, 5 Gilman (10 Ill.) 573, 588, 589, 50 Am. Dec. 422.

"In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U. S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; Fillippon vs. Albion Vein Slate Co., 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761."

*"'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'"

II.

The statement of Cantrell (R. 53) was hearsay and inadmissible, because statements of a co-conspirator, to be admissible against his fellow conspirators, must not only have been made during the continuance of the conspiracy, it must likewise have been made in furtherance of its object. *Logan vs. U. S.*, 144 U. S. 263. *Collenger vs. U. S.*, 50 Fed. (2d) 345 (CCA 7). *Tofanelli et als. vs. U. S.*, 28 Fed. (2d) 581 (CCA 9).

In *Kelly vs. United States*, 105 Fed. (2d) 912 (CCA 2), the court held:

> "Declarations of accused fellow conspirators are competent evidence only when made in pursuance of a common object and are admitted as part of the execution of the plan and impliedly authorized by the other conspirators."

The decision of the Fifth Circuit Court of Appeals at page six in the instant opinion held:

> "There was no error in admitting Cantrell's statement. He was one of the principal actors in the illegal undertaking and his statement to the officers was *relevant* as to what was going on."

We seriously challenge the proposition of law that "relevancy" is the test of the admissibility of evidence; even as hearsay evidence is generally relevant although obviously inadmissible.

In *Clark vs. United States*, 61 Fed. 2d 409, the Fifth Circuit Court of Appeals held:

"It appears Stewart and Thomas were the principal conspirators * * *.

"As to statements that were made by Thomas in August, it is possible the conspiracy had been abandoned, at any rate they were merely narratives of past events. And clearly, they were not made by Thomas in furtherance of the conspiracy, and were not part of the res gestae of any overt act. *Considering the conflicting evidence before the jury, we cannot say that the testimony, improperly admitted, was harmless. These errors require a reversal of the judgment.*"

This latter principle of law also applies to the question of counsel being refused permission to examine the memorandum, for there certainly was conflicting evidence in this case.

III.

On the question of the circumstantial evidence, we will not summarize the evidence in the interest of brevity. However, the Fifth Circuit Court of Appeals, in its opinion at page six, agrees that the evidence as to petitioners, Miller and Crosby, was wholly circumstantial.

We seriously contend that this evidence does not measure up to the standard required by that same Court in *DeLuca vs. United States*, 298 Fed. 412 (CCA 5), where the rule was stated to be:

"The rule of law where the Government relies upon circumstantial evidence alone, is that the circumstances proven must not only point to the defendant's

> guilt, but must be inconsistent with his innocence. As otherwise stated, the circumstances proven must be such as to admit of no other reasonable hypothesis or explanation other than the guilt of the accused."

The foregoing case was cited by the same Court in *Kassin vs. United States,* 87 Fed. (2d) 183 (CCA 5):

> "Links in chain of guilt forged by purely circumstantial evidence must be clearly proven and taken together, point to moral certainty, not merely possibility or probability of guilt, to justify conviction of either substantive offenses or conspiracy to commit them."
>
> "Relevant and cogent circumstances may constitute evidence of accused's guilt, but they must have legal as well as logical relevancy and point to guilt with compelling force; circumstances merely raising suspicion or leaving room for conjecture being insufficient."

In the opinion of the Fifth Circuit Court of Appeals in this case at page five, the Court stated:

> "It was further shown that Miller and Deese had, from time to time, purchased large quantities of sugar and rye under assumed names."

With all due deference to the Honorable Court, we are unable to find a single scintilla of testimony that Miller ever bought any sugar or rye at any time, and we seriously contend that the Court erred in making any such finding without any basis in the record.

CONCLUSION.

Therefore, the premises considered, it is respectfully urged that this is a case where jurisdiction should be taken by this Honorable Court and the judgment of conviction reversed and a fair trial awarded to the petitioners as guaranteed by the Constitution of the United States and the Rules of Practice and Procedure.

DAN R. SCHWARTZ,
Attorney for Petitioners.

April, 1942.

APR 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 1168

JAKE DEES AND FRANK DEES,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FRANK F. L'ENGLE,
Attorney for Petitioners.

DILLON HARTRIDGE,
Of Counsel for Petitioners.

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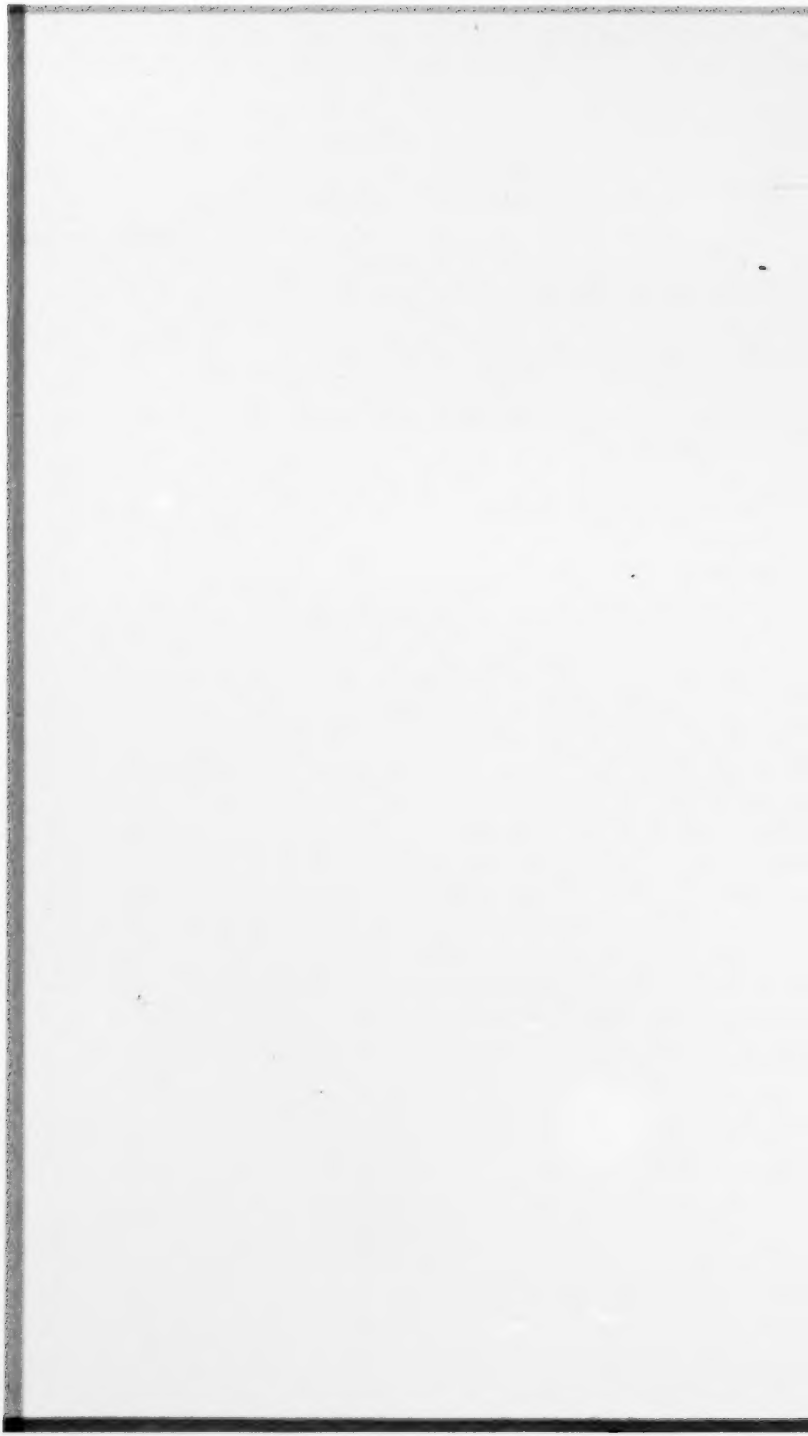

IN THE
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October Term, 1941.

No.

JAKE DEES AND FRANK DEES,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Come now Jake Dees and Frank Dees and respectfully show and represent to this Honorable Court as follows:

1. Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, No. 9972, entered on February 20, 1942. Petition for rehearing was denied on March 24, 1942, affirming the orders and judgment of the United States District Court in and for the Southern District of Florida, Jacksonville Division.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under section 240-(a), of the Judicial Code as amended and the Rules of Practice and Procedure in Criminal Cases, as promulgated by this Honorable Court.

REASONS RELIED UPON FOR SEEKING THE JURISDICTION AND FOR THE ALLOWANCE OF THE WRIT.

Because the United States Circuit Court, in affirming the orders and judgment of the District Court:

1. Has decided important questions of general law in conflict with the weight of authority.

a. Said decision on question of general law conflicts with opinions of this Honorable Court in *Taylor vs. U. S.*, 76 Law Ed. 951.

b. Said decision on question of law conflicts with decision of other Circuit Courts of Appeal, namely, *Raniele vs. U. S.*, 34 F. (2d) 877; *DePorter vs. U. S.*, 34 F. (2d) 275; *U. S. vs. Hirsch*, 57 F. (2d) 555; *Bell vs. U. S.*, 9 F. (2d) 820; *U. S. vs. Di Carvo*, 37 F. (2d) 124; and others.

2. The decision has so far departed from the accepted and usual judicial procedure and has so far sanctioned such a departure by the lower court as to call for an exercise of the power and supervision of this Honorable Court.

a. Said decision sanctions the search and seizure of a dwelling and curtilage in the country without the use of a search warrant.

b. The Circuit Court of Appeals apparently sanctioned the violation of the petitioners' constitutional right to be free from unreasonable searches and seizures, for its opinion is based upon a statement of facts not supported by the record. (See record, page 56.)

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioners were convicted of violation of the Internal Revenue Laws of the United States, relating to non-tax paid distilled spirits, both the substantive offense and a conspiracy being consolidated for trial.

The petitioner, Jake Dees and his wife and child were living on a farm in the Southern District of Florida; the petitioner, Frank Dees is the brother of Jake Dees and was visiting him at the time of the search.

Officers of the Alcohol Tax unit saw a truck on a public highway, driven by Frank Dees which was loaded with charcoal and sugar; the officers followed the truck twenty-five and a half miles, at which point they lost sight of the truck for thirty minutes. The officers returned and examined a road leading into a large pasture and saw where a dual-wheeled truck had turned off the highway. The officers followed the truck tracks through the pas-

ture gate and followed the tracks one half mile to the petitioners' farm. The officers stopped in front of a gate leading to the house where they saw Mrs. Dees and child. Officers at this point smelled mash. Officer Anderson did not go to the house but went down the fence and entered the gate of the mule lot, 75 or 100 yards from the house. He saw no men in the barn but saw truck had entered the mule lot gate. The barn was enclosed by chicken wire fence and chickens and ducks were around the barn. Officer Anderson went around the chicken wire fence, stepped over a field fence and proceeded to the back of the barn, at which point he saw a still and heard men talking. Anderson then entered and arrested Jake Dees and Frank Dees, seizing sugar, charcoal, a truck and destroyed the still.

The question is whether officers had the right to enter the curtilage and make exploratory search having only odor of mash for evidence. The Court in its opinion on page 5 stated "the officer did not go into the enclosure until he had smelled the mash, heard men talking and had actually seen the still in operation". This statement is obviously incorrect. (Transcript, page 56.) This did not decide the question presented.

SPECIFICATION OF ERROR.

1. Failure of trial Court to grant motion to suppress evidence.

2. Failure of trial Court to exclude evidence obtained by unlawful and illegal search and seizure.

ARGUMENT.

In *Taylor vs. U. S.*, 76 Law Edition 951, the Court said:

> "The action of prohibition agents who have received information over a considerable period concerning illegal selling at certain premises went there in the night time and smelled whiskey in the vicinity of the garage thereon, and seeing many card board boxes therein, broke the fastening on the door, entered and seized a quantity of whiskey without having obtained a search warrant though they had opportunity to do so constitutes an unreasonable search and seizure."

The Supreme Court indicates in the *Taylor* case that the mere smell of intoxicating liquor is not sufficient to warrant an officer in making a search without first obtaining a warrant and it has frequently been held since the *Taylor* case was written and before the mere smell of intoxicating whiskey or mash standing alone is not sufficient to obtain a search warrant unless there are other facts to strengthen and substantiate the evidence thus obtained.

Such evidence was held insufficient in *Raniele vs. U. S.* (C. C. A.) 34 F. (2d) 877, and *DePorter vs. U. S.* (C. C. A.) 34 F. (2d) 275, 74 A. L. R. 1413, in which private houses were searched. Other cases holding that the sense of smell is not sufficient evidence to warrant a search without a warrant are: *U. S. vs. Hirsch* (C. C.) 57 F. (2d) 555, 556; *Temperani vs. U. S., supra; Bell vs. U. S.* (C. C. A.) 9 F. (2d) 820; *U. S. vs. DiCarvo* (C. C.) 37 F. (2d) 124; *Schroeder vs. U. S.* (C. C. A.) 14 F. (2d) 500; *Staker vs. U. S.* (C. C. A.) 5 F. (2d) 312; *Day vs. U. S.* (C. C. A.)

37 F. (2d) 80, and *U. S. vs. Dean* (D. C.) 50 F. (2d) 905, 906.

CONCLUSION.

Therefore, the premises considered, it is respectfully urged that this is a case where jurisdiction should be taken by this Honorable Court and the judgment of conviction reversed and a fair trial awarded to the petitioners as guaranteed by the Constitution of the United States and the Rules of Practice and Procedure.

Respectfully submitted,

FRANK F. L'ENGLE,
Attorney for Petitioners.

DILLON HARTRIDGE,
Of Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1152

HARRY LEAFORD MILLER AND SAMUEL EUGENE CROSBY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1168

JAKE DEES AND FRANK DEES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94–98) is reported in 126 F. (2d) 771.

JURISDICTION

The judgment of the circuit court of appeals was entered February 20, 1942 (R. 98). On March

24, 1942, the circuit court of appeals denied (R. 110) the petitions for rehearing filed by petitioners Miller and Crosby (R. 99–106) and by petitioner Jake Dees (R. 107–109). The record does not show that a petition for rehearing was filed by Frank Dees. The petition for a writ of certiorari on behalf of Miller and Crosby (No. 1152) was filed on April 16, 1942, and on behalf of Jake and Frank Dees (No. 1168) on April 23, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934. Since the petition in No. 1168 was filed more than 30 days, exclusive of Sundays and holidays, after the entry of judgment of the circuit court of appeals, we think it was not filed in time insofar as Frank Dees is concerned.

QUESTIONS PRESENTED

Petitioners Miller and Crosby present the following questions:

1. Whether the denial of petitioners' request to inspect the report from which a Government witness refreshed his memory as to a truck license number constitutes reversible error.

2. Whether the trial court improperly admitted testimony of the statements of an alleged co-conspirator who was not on trial.

3. Whether there is substantial evidence to support the judgments of conviction.

The petition of Jake and Frank Dees raises the single question:

4. Whether evidence obtained as the result of a search of petitioner Jake Dees' barn should have been suppressed and its admission excluded because the search was illegal.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of Florida under two indictments, one of which charged, in six counts, violations of Sections 2803 (a), 2810, 2833, and 2834 of the Internal Revenue Code (26 U. S. C. 2803 (a), 2810, 2833, 2834) relating to the possession, manufacture, and concealment of alcohol and failure to register a still; the other indictment charged a conspiracy to commit the foregoing offenses in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 1–9). The indictments were consolidated for trial (R. 13–14) and petitioners were found guilty on all counts. Petitioners were sentenced on the conspiracy count to eighteen months' imprisonment. A consecutive general sentence of three years' imprisonment which was suspended, with probation to begin at the expiration of the prior sentence, was imposed on the substantive counts (R. 21–33). Upon appeal the judgments of conviction were affirmed (R. 98).

The Government's case may be summarized as follows:

On March 7, 1941, a stake-bodied Ford truck, bearing a Georgia license tag and similar to one reported to investigators of the Alcohol Tax Unit as hauling large quantities of sugar, was disabled by a flat tire and a broken spring on the highway near Bostwick, Florida (R. 53, 63). The truck, loaded with 100-pound bags of sugar covered with bags of charcoal, attracted the attention of two Government investigators who were driving by (R. 53, 63). While the investigators were examining the truck, defendant Cantrell[1] emerged from the woods adjoining the highway and told the investigators that "men had gone to get another truck"; that he was "not from Georgia"; and that "he caught a ride going south" with the "other fellows" who "were from up around Jacksonville" (R. 53, 63).

The investigators withdrew from the scene, and shortly thereafter petitioner Miller appeared in a 1941 model Ford pick-up truck (R. 53–54, 63, 66). A large stake-bodied truck drove up to the disabled truck, and petitioner Crosby, who had arrived in a Buick sedan, helped others transfer the load of sugar and charcoal to this truck (R. 54, 64, 67). When the truck was loaded and covered with a tarpaulin (R. 55), it proceeded south toward Palatka, Florida, followed by petitioners Miller and Crosby in the Buick. On the highway south

[1] Cantrell became ill at the trial, and a mistrial and severance were granted as to him (R. 14–15).

of Palatka, the truck stopped at a pasture gate but the Buick continued down the road (R. 55, 61). Shortly thereafter the Buick was turned around and driven back toward Palatka. The direction of the Buick was soon reversed, and it headed south "at a fast speed." Crosby was driving and Miller "ducked down and sat real low" so that one "could only see the top of his head". (R. 56, 61, 64.) The officers pursued the Buick. When they finally caught and arrested petitioner Crosby for reckless driving, he gave in turn two fictitious names (R. 64–65, 67).

In the meantime, other officers followed the dual wheel tracks of the loaded truck from the pasture gate to a farm a half mile away (R. 56, 61). Here Investigator Anderson "could smell cooking mash." Continuing to follow the dual wheel tracks, the investigator passed through two fence gates, the second of which was from twenty-five to thirty feet from the barn. "He could see the truck tracks go in the front door of the barn. The barn door was shut. He could smell cooking mash and hear men talking." The barn was encircled by a high chicken wire fence. Anderson "stepped over the field fence wire and followed the chicken wire fence" until he came to a window opening into the barn. Looking through the window, he saw a large copper still in operation and some one operating it. He proceeded to the front of the barn, passed

through an unlocked gate in the chicken wire fence and into the barn where he arrested petitioners Jake and Frank Dees and defendant Lee Cantrell (R. 56–57). In the barn was a large unregistered copper distillery with whiskey running from the coil. The fire pot had just been pulled from the still. There were also 108 barrels, 96 of them full of mash, as well as 145 gallons of unstamped "moonshine" whiskey (R. 57–58, 61–62). Besides the 50 sacks of sugar and 29 bags of charcoal still loaded on the truck which the officers had trailed from Palatka, there were additional amounts of sugar and charcoal and 32 sacks of rye (R. 57, 62).

The disabled truck from which the load had been removed was located the next day in the garage at 811 West Church Street, Jacksonville, where petitioner Miller had leased parking space (R. 57–58). The blown-out tire from the disabled truck was found in Miller's 1941 pick-up truck which had been left in the woods the previous day. Sprinklings of sugar, rye, and charcoal were observed on the floor of the pick-up truck, as well as 3 additional license plates hidden under the floor mat. (R. 62, 65.) These plates were identified in connection with the purchase of large quantities of sugar which had been carried away by trucks bearing the same numbers (R. 65, 70–72).[2]

[2] The wholesalers who sold sugar to petitioners kept reports of their sales which contained the name and automobile

ARGUMENT

1. An investigator for the Alcohol Tax Unit, while testifying about an earlier inquiry he had conducted into suspicious sales of sugar to petitioner Miller, referred to a report to refresh his memory (1) as to the correct address of the garage into which Miller had driven his truck loaded with sugar and (2) as to the numbers on the license tags which had been substituted on that truck (R. 89, 91).

Miller and Crosby admit that it was "harmless" error to deny inspection of the report insofar as the garage address is concerned (R. 101) but contend that they were prejudiced by the denial of their request to examine the report with respect to the license number (Pet. 5–9).[3] However, except for the bald assertion that "the evidence as to trucks permeated the entire case" (Pet. 8), petitioners do not undertake to show that they were deprived of any substantial rights by the court's

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license number of each purchaser and the quantity of sugar sold. One wholesaler alone sold petitioner Jake Dees, under the name of Leon Lebrosky, 29,500 pounds of sugar and 3,600 pounds of rye during the three-week period from February 9 to 25, 1941; and the record also reveals that 12,000 pounds of sugar and 2,800 pounds of rye were sold at various times to persons who drove trucks bearing license numbers corresponding to those found on Miller's truck (R. 70–72. Cf. R. 73).

[3] The license number in question, "2GH2582," was not shown to have been on any of the trucks to which the wholesalers had delivered sugar and rye, nor was it identified with any of the trucks involved on March 7.

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refusal to permit inspection of the report. Accordingly, as the court below held (R. 98) "the error was harmless and without prejudice to the defendants" (cf. *Goldman* v. *United States,* Nos. 962, 963, 980, October Term, 1940, decided April 27, 1942; *United States* v. *Easterday,* 57 F. (2d) 165, 167 (C. C. A. 2), certiorari denied, 286 U. S. 564; *Taylor* v. *United States,* 19 F. (2d) 813, 818–820 (C. C. A. 8)) and, in the light of the entire record, is too insubstantial to warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); *Spivey* v. *United States,* 109 F. (2d) 181, 185 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Borum* v. *United States,* 56 F. (2d) 301, 303–304 (App. D. C.), certiorari denied, *sub nom. Logan* v. *United States,* 285 U. S. 555; *Haywood* v. *United States,* 268 Fed. 795, 798 (C. C. A. 7), certiorari denied, 256 U. S. 689.

2. Petitioners Miller and Crosby maintain (Pet. 10) that the trial court improperly overruled an objection to testimony of statements of Cantrell, a co-conspirator whose case was severed, to the Government investigators who stopped to examine the disabled truck on March 7, 1941 (R. 53, 63; see *supra,* p. 4). The statements, chiefly in the nature of a self-serving profession of innocence, were, as the court below held (R. 98), "relevant as to what was then going on" in furtherance of the conspiracy and hence admissible. *Delaney* v. *United States,* 263 U. S. 586, 590; *United States*

v. *General Motors Corporation,* 121 F. (2d) 376, 408 (C. C. A. 7), certiorari denied, 314 U. S. 618; *United States* v. *Pecoraro,* 115 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685.[4] In any event since the statements did not incriminate any of the petitioners, their admission even if erroneous would not warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); and see cases cited *supra,* p. 8.

3. It is finally contended by petitioners Miller and Crosby that the evidence fails to support the conviction because it "was wholly circumstantial" and not inconsistent with their innocence (Pet. 11–12). But on appeal "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942. The record discloses that thousands of pounds of sugar and rye were sold to persons who carried them away in trucks bearing license plates afterwards

[4] See also *Clune* v. *United States,* 159 U. S. 590, 593; *McDonald* v. *United States,* 89 F. (2d) 128, 135 (C. C. A. 5); *Schefano* v. *United States,* 84 F. (2d) 513, 515 (C. C. A. 5); *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2); *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867; *Carnahan* v. *United States,* 35 F. (2d) 96, 103 (C. C. A. 8), certiorari denied, 281 U. S. 723; *Miller* v. *United States,* 24 F. (2d) 353, 362 (C. C. A. 2), certiorari denied, 276 U. S. 638; cf. *Van Dam* v. *United States,* 23 F. (2d) 235, 238 (C. C. A. 6).

discovered in Miller's pick-up truck (R. 62, 65, 71–72). Miller had obviously come to the rescue of the disabled truck found on the roadside loaded with 100-pound bags of sugar. The blown-out tire from the disabled truck was in his pick-up truck which he had left in the woods, as well as a "sprinkling of rye, sugar and charcoal on the floor of the truck" (R. 65); and the disabled truck was located in his garage space the next day (R. 57–58). Crosby actually transferred the sugar to the truck which carried it to the still-house (R. 54, 65, 67). Both escorted the sugar for approximately 25 miles until the truck turned off the main road to Jake Dees' farm, and they fled "at a fast speed" when the officers were in pursuit (R. 53, 56, 66). We therefore submit that the jury was fully justified in finding petitioners guilty on all counts, for where a conspiracy is established, slight evidence connecting the defendant therewith may still be substantial and, if so, sufficient to sustain a conviction. *Meyers* v. *United States,* 94 F. (2d) 433 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Galatas* v. *United States,* 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.[5]

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[5] Likewise, with respect to the indictment charging substantive offenses, it is well established that if a conspiracy is shown, as in the present case, the acts and declarations of one defendant, outside the presence of his co-defendants, but in the course of the conspiracy, are admissible against the latter, even though a conspiracy is not charged in the indict-

4. Petitioners Jake and Frank Dees specify error (Pet. 4) upon the failure of the trial court to suppress and exclude evidence obtained by the officers who entered the barn and arrested them on March 7, on the ground that they had illegally entered the curtilage of Jake Dees' farm.

Apart from the untimeliness of his petition (see p. 2, *supra*), Frank Dees clearly has no standing to raise this issue. The opinion below states that "in the argument before this court it was conceded by counsel that the record is without error as to him" (R. 97) and, at any rate, since he was merely "visiting" (Pet. 3) the premises, he may not complain of the admission of evidence uncovered by the allegedly unlawful search. *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Connally* v. *Medalie*, 58 F. (2d) 629, 630 (C. C. A. 2); *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10); cf. *Agnello* v. *United States*, 269 U. S. 20, 34; and see

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ment. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *United States* v. *Cohen*, 124 F. (2d) 164, 166 (C. C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States*, No. 870, this Term, March 2, 1942; *Quercia* v. *United States*, 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States*, 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States*, 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

Goldstein v. *United States,* No. 256, this Term, decided April 27, 1942.[6]

Petitioner Jake Dees seems to contend that, apart from the odor of cooking mash, Investigator Anderson had no probable cause to search the barn until after he had entered the "curtilage," i. e., after he had "stepped over a field fence and proceeded to the back of the barn, at which point he saw a still and heard men talking" (Pet. 4). The record is not clear as to the extent of the curtilage. There is nothing to identify the "mule lot" or "mule lot gate" referred to by petitioner (Pet. 4) and while reference is made to apparently six different fences (R. 56, 57, 59), we are unable to tell whether any of them surrounded the house, or the house and the barn. But it is apparent from the record that *before* the investigator "stepped over the field fence", when he was still "twenty-five or thirty feet from the barn", he saw "the truck tracks go in the front door of the barn" and "could smell cooking mash and hear men talking" (R. 56). Furthermore, the record reveals that the barn was completely encircled by a high chicken wire fence, thus isolating it from the rest of the farm, and that the investigator looked through the window and saw the still in operation before he

[6] Motions to suppress (R. 11, 12) were made by Jake Dees alone, and the record does not indicate that any evidence seized by the officers was introduced at the trial or that any objection was made to the testimony of the officers.

crossed the chicken wire fence (R. 56–57, 97). Thus it would seem that the investigator had not yet entered the curtilage when he saw the still in operation, and certainly he had not when he saw that the truck tracks entered the barn door and heard men talking within.

Even assuming that the investigator had trespassed upon the curtilage before becoming aware that the still was being operated in the barn, it is settled that "The protection of the Fourth Amendment does not extend to the land surrounding the house" (*United States* v. *Feldman*, 104 F. (2d) 255, 256 (C. C. A. 3), certiorari denied, 308 U. S. 579) and that evidence is admissible although there was a trespass for the purpose of observation. *Hester* v. *United States*, 265 U. S. 57; *Koth* v. *United States*, 16 F. (2d) 59 (C. C. A. 9); *Schulte* v. *United States*, 11 F. (2d) 105 (C. C. A. 5); *United States* v. *Phillips*, 34 F. (2d) 495 (N. D. N. Y.). See *Raine* v. *United States*, 299 Fed. 407, certiorari denied, 266 U. S. 611.

Petitioners rely upon *Taylor* v. *United States*, 286 U. S. 1, in which this Court held that the presence of the odor of cooking mash alone does not warrant an exploratory search. However, in that case the Court declared (p. 6) that "Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime," and said that since, unlike the present case, no arrest was

made, it was unnecessary "to discuss the rule in respect of searches in connection with an arrest." See *Pong Ying* v. *United States,* 66 F. (2d) 67, 68 (C. C. A. 3). In the present case petitioners admit that the investigator could smell mash before entering the curtilage (Pet. 4; see R. 56); the disabled truck had been "reported to be hauling large quantities of sugar" (R. 53); it was found loaded with sugar; and the tracks of the reloaded truck demonstrated that it had turned in the pasture gate toward petitioners' farm (R. 54, 56). Accordingly, we submit, the officers at that point had reasonable grounds for believing that a felony was being committed on petitioners' premises and had the right to enter without a warrant for the purpose of making an arrest and, as an incident to such arrest, were justified in searching the premises for evidence of crime. *Agnello* v. *United States,* 269 U. S. 20, 30; *United States* v. *Feldman,* 104 F. (2d) 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Rocchia* v. *United States,* 78 F. (2d) 966, 969 (C. C. A. 9); *Wida* v. *United States,* 52 F. (2d) 424, 425 (C. C. A. 8); *McBride* v. *United States,* 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614.[7]

[7] See also *Parks* v. *United States,* 76 F. (2d) 709, 710 (C. C. A. 5), certiorari denied, 296 U. S. 573; *Stark* v. *United States,* 44 F. (2d) 946, 948 (C. C. A. 8); *Schnorenberg* v. *United States,* 23 F. (2d) 38, 39 (C. C. A. 7); *Dulek* v. *United States,* 16 F. (2d) 275 (C. C. A. 6); *Koth* v. *United States,* 16 F. (2d) 59, 61 (C. C. A. 9); *United States* v. *White,* 29 F. (2d) 294, 295–296 (D. Neb.).

CONCLUSION

The decision below is correct, and no conflict of decisions or any question of general importance is presented. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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